No. 7771

United States
Circuit Court of Appeals
For the Ninth Circuit

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a corporation,
Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a corporation,
Appellee.

On Appeal from the District Court of the United States for the District of Oregon.

Appellant's Petition for Rehearing

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To the Honorable Curtis D. Wilbur, William Denman, and Bert E. Haney, Judges of the Circuit Court of Appeals for the Ninth Circuit:

The Northern Pacific Terminal Company of Oregon, appellant, hereby petitions this Honorable Court for a rehearing of this cause upon the ground that the Court, while recognizing the principle of law involved, has misapplied the same to the facts in this case, in that

(1). It has assumed that the appellant had control

of the shipments at all times and could direct or change the destination thereof. This is not the fact and particularly with reference to the Standard Oil Company shipments which were made by the Standard Oil Company on contracts of sale of the oil for delivery f. o. b. oil spur Guilds Lake.

(2). That the Court has misapplied the law in finding and determining that under the wording of the bill of lading it was the intention of the parties that delivery should be made at the interchange track at Guilds Lake instead of the oil spur track at Guilds Lake and has determined that there was some duty on the part of the appellee to exercise an option in some manner not done, notwithstanding the appellant had taken every means to notify the appellee of the intention to deliver, and the fact that the same were actually delivered, to the oil spur at Guilds Lake.

Respectfully submitted,

JOHN F. REILLY,

JAMES G. WILSON,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for appellant in the above entitled cause does hereby certify that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

JAMES G. WILSON,

Counsel for Appellant.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

Throughout the opinion of this court it is assumed and held that the appellant had at all times control of the shipments so that it could terminate the shipment at any point it saw fit. On page 5 of the printed opinion it is said:

> "The billing in this case becomes important evidence as to *where defendant intended* the common carrier movement to end for the *defendant* could easily have prevented any uncertainty by requiring the billings to designate the unloading track at Guilds Lake. Under the circumstances as here shown it was *defendant's duty* to clearly indicate its intention as to where the common carrier transportation was to end and not permit any speculation in this regard."

While it is true that plaintiff's complaint alleged that the plaintiff had recevied the shipments from the defendant as *consignor* (Tr. 3, Par. IV, P. 4, Par. VI, P. 5, Par. VIII) its proof failed to sustain such allegation but the evidence showed that plaintiff did not receive a single shipment from defendant as *consignor* but did in fact receive the shipments up to January 6, 1930, from the Standard Oil Company as consignor, and on the shipments subsequent to January 6, 1930, from the Richfield Oil Company as consignor. (Tr. 48, 68.)

The defendant was in no case a party to the transportation contracts. In fact, it never saw the bills of lading until this action was commenced. Did not know of any claimed insufficiency in the bills of lading. It

had nothing whatever to do with the bills of lading or knew how the shipments were billed. The plaintiff, however, was a party to the bills of lading, had been repeatedly told what the destination of the shipments was, knew that they were destined to the oil spur track and being moved to the oil spur track as shown by the letter of R. W. Pickard, to Carey & Kerr, November 24, 1926 (Tr. 78), where it is stated that movements were being made "from Willbridge to the *N. P. terminal storage tank in Guilds Lake.*"

It is made the duty by statute, both with reference to interstate shipments (Sec. 20-11, Interstate Commerce Act) and in Oregon intrastate shipments (Oregon Laws, 1930, Sec. 62-2101) for the initial carrier to issue a receipt or bill of lading. This duty has been interpreted to require the initial carrier to issue a bill of lading free from ambiguity and uncertainty. Gill-Andrew Lumber Co. v. Director General, 57 I. C. C. 493, 494. In connection with these statutes, in both the Interstate Commerce Act and in the Act of Oregon, the initial carrier is obligated to the consignor on joint shipments to the point of final delivery. This is especially important in connection with the Standard Oil shipments in view of the fact, as hereinafter more particularly pointed out, the title to the oil, the right of diversion, and the right of stoppage in transit obtained in the Standard Oil Company up until the shipments reached the oil spur in Guilds Lake.

The S. P & S., with full knowledge of where the shipments were going issued its bill of lading, and if something more was necessary to be shown on the bill

of lading it was the duty of the S. P. & S. to so designate it for it was a party to the bills of lading and not the Terminal Company, and it had the requisite knowledge, whereas the Terminal Company never saw the bills of lading and was not a party thereto. This court however notwithstanding these facts has cast, contrary to the statute and the decisions, this duty upon the defendant. In this we submit the court was in error.

The court has also treated this oil as being owned by the defendant during transportation. This is not supported by the evidence with reference to the Standard Oil Company shipments. The contract of purchase of the oil between the Terminal Company and the Standard Oil Company provided that the oil was sold by the Standard Oil Company to the Terminal Company f. o. b. fuel oil spur Guilds Lake, Portland. (Tr. 96.) It was therefore the obligation of the Standard Oil Company to deliver said oil at the oil spur at Guilds Lake. It could do so in any manner it saw fit. Of course, the cheapest method was by the rail carriers of which the Terminal Company was one and it chose this method.

The general freight agent of the plaintiff defined the words "company material" as follows:

> "The phrase 'company material' is applied to commodities that are owned by one of the companies participating in the transportation of them." (Tr. 41.)

The Terminal Company did not own any of the oil shipped by the Standard Oil Company until it reached the oil spur at Guilds Lake. Therefore, the oil did not

become "company material" until it arrived at that spur. The Terminal Company could not therefore elect to take deliverey as suggested in the court's opinion until the oil reached that spur, for it was the property of the Standard Oil Company at all times up to that point. Contracts of shipment, that is, the bills of lading, were made by and between the Standard Oil Company and the S. P. & S. The Standard Oil Company retained the bills of lading as owner, as it should. In the event of accident or destruction or loss of the shipment prior to reaching the oil spur, the Standard Oil Company and not the Terminal Company would have the right to recover for any injury or loss or misdelivery thereof. The Terminal Company would have had a cause of action on its contract of purchase against the Standard Oil Company for failure to deliver the oil at the oil spur but not against the S. P. & S. for the Terminal Company had no title to the oil. In the event the Terminal Company had sued the Standard Oil Company for its failure to so deliver, the Standard Oil Company would have had a cause of action against the S. P. & S. Had the Standard Oil Company sued the S. P. & S. therefor the S. P. & S. could not have counterclaimed or defended on the ground that it had delivered the same at the interchange track because under its tariffs it had undertaken to deliver, for the freight rate which it had already received, at any place within Guilds Lake and the Standard Oil Company could have compelled delivery at the oil spur by the S. P. & S. without additional payment of freight.

This court has held that the bill of lading made out

simply to "Guilds Lake" showed an intention to deliver at the interchange track. Whose intention? It certainly was not the intention of the Standard Oil Company that it should be delivered at the interchange track because it had contracted with the Terminal Company to deliver it at the oil spur and it had paid the freight charges which would insure its delivery there and it could compel the S. P. & S. to deliver it there for the freight charges which had been paid. Of course, to make the delivery there the S. P. & S. would have to use the facilities and the services of the Terminal Company as a common carrier, but the Terminal Company could not have stopped the transportation short of the oil spur because it had no right to take delivery of the property as its own, short of that destination. The S. P. & S. was compelled and could be compelled by the Standard Oil Company, on account of the joint tariff, to transport the oil as a common carrier to the oil spur. Furthermore, the Standard Oil Company as owner of the oil and as consignor had the right to divert the shipment at any time up to the time it reached the oil spur, and the title to the oil was transferred to the Terminal Company. It likewise had the right of stoppage in transit in the event of the insolvency of the Terminal Company up to the time it reached the oil spur and neither the S. P. & S. nor the Terminal Company, as a carrier, could have denied this right if it had been exercised by the Standard Oil Company without being liable in damages as carriers to the Standard Oil Company.

But this court has taken into account only one ele-

ment, upon which it has determined the intention of the parties, to wit: the designation of the destination as "Guilds Lake." The S. P. & S. knew that Guilds Lake covered not only the interchange track but numerous tracks including the oil spur to which under the joint tariff it had undertaken to make delivery for the rate paid it. We submit that it was its duty and not the duty of the Terminal Company, if there was any doubt in its mind, to ascertain the exact track to which the oil was destined. The law, both statutory and as interpreted, cast upon it as the issuer of the bill of lading this duty.

The Court, however, we submit has overlooked a very material part of the evidence in this case, in determining the intention of the parties to the bills of lading, to wit: the routing designated in the bills of lading which read as follows:

> "Consigned to Northern Pacific Terminal Company, Guilds Lake, Portland, State of Oregon, Route SP&S-N. P. T."

The General Freight Agent of the S. P. & S. testified:

> "Normally such a designation as N. P. T. would indicate that the Terminal Company was to participate in the transportation. (Tr. 48.)

The witness, however, goes on to state that in this case it meant nothing to him. Why, with a tariff requiring delivery at any place in Guilds, for the money which was paid to the S. P & S. and to some of which points it required the service of the "N. P. T. Co." to make delivery, and having those initials designated in

the route of shipment, should this not show the intention that the Terminal Company was to participate as a carrier in the transportation, when ordinarily such initials in the routing would indicate that fact to the railroad. Does it not show in the bill of lading itself the intent that the Terminal Company was to be a carrier on the route of shipment, especially when it was the duty of the issuer of the bill of lading to issue a bill free of ambiguity, especially when the record showed at all times the plaintiff in fact knew where the shipments were destined and were in fact being moved, and the Terminal Company was claiming that it was performing a common carrier service and that it was not accepting delivery at the interchange track. Did the duty cast upon the S. P. & S. not require it either to make the bill of lading, which it issued, read to the oil spur or with knowledge of where the shipment was intended to go, report and pay to the Terminal Company its proportion of the freight charges?

The Standard Oil Company, being the owner of the oil until it reached the oil spur, it would be interesting to know whether or not the S. P. & S. would have claimed the entire revenue had the Standard Oil Company shipped the same on a shipper's order bill of lading consigned to "Standard Oil Company, Guilds Lake, Notify Northern Pacific Terminal Company" and whether or not it would under those circumstances have claimed a delivery to the Standard Oil Company at the interchange track. We think under these circumstances the S. P. & S. would readily concede that such delivery was not at the interchange track and would have paid

the Terminal Company its division and permitted the same to be delivered at any track in Guilds Lake.

In this connection this Court says, at page 5 of its printed opinion:

> "Applying the rule quoted, supra, that defendant is entitled to the same consideration as any commercial shipper, we hold that the designation shown as 'Guilds Lake' in the billing meant the interchange track at Guilds Lake."

We submit that in a commercial shipment this would not be the rule for there were no delivering facilities at the interchange track. It was simply a make-up and break-up yard where cars are classified and made up into trains but no shipments are delivered to consignees at that point. Furthermore, it is conceded that with reference to commercial shipments the shipper could even after the movement designate for delivery any point covered by the tariff as was conceded in shipments of oil to the Northern Pacific Railway Company consigned simply to the Northern Pacific Railway Company, Portland, Oregon, without any track being designated. (Tr. 81. Mr. Hart's concession, Tr. 82). Furthermore, the S. P. & S. had no right to make a delivery of a commercial shipment at Guilds Lake interchange track. It could only go upon that track for the purpose of an interchange for further shipment. We therefore submit that the court was in error in stating that such billing, with reference to a commercial shipment, would be interpreted as intended to be delivered on the interchange track.

On page 3 of the opinion the Court suggests that

perhaps the agreement for division, if in writing, might shed some light upon the intentions of the parties. The agreement was in writing, a very short simple statement, signed by all parties to the tariff to the effect that where two or more carriers participate in any shipment under the zone switching tariff the revenue would be divided equally between the number of carriers participating in the movement so that it contains no evidence in regard to the point here in dispute.

With reference to the Richfield Oil Company shipments the oil was purchased f. o. b. Richfield Oil plant at Linnton. The Terminal Company owned the oil during the transportation. The Richfield Oil Company however entered into the contract of shipment with the S. P. & S. and the Terminal Company never saw the bills of lading. The Terminal Company did, however, indicate that it did not accept the shipments for delivery at the interchange track and this was constantly called to the plaintiff's attention, because in this case the Terminal Company paid the freight and refused to pay anything but the S. P. & S. proportion of the freight for the through transportation from Linnton to the oil spur. These shipments were being transported almost daily. The Terminal Company as collector of the freight was making remittances monthly to the S. P. & S. on the basis that the transportation did not cease at the interchange track and it was not taking delivery at the interchange track, but at the oil spur track. The testimony of J. A. Johnsrud, Chief Clerk of Traffic Accounts of the plaintiff (Tr. 84) is significant:

"On the shipments from the Standard Oil Com-

pany, which were prepaid, the S. P. & S. agent collected the money, the S. P. & S. had the money and refused to give any of it to the Terminal Company.

"On shipments from the Richfield Oil Company the shipments were not prepaid, the Terminal Company paid the freight and retained one-half the charge."

If the letters which were exchanged between the parties, and which this court says do not comply with the duty of the Terminal Company to notify the S. P. & S. of its intention not to take delivery at the interchange track, what could be more expressive of the intention of the Terminal Company as to the destination of the shipments than its refusal every month during a period of over two years to pay the S. P. &. S. more than its division of the freight?

On page 5 of the court's opinion it is stated:

"The requests for a division of the charges in these letters would be some evidence as to defendant's intention with respect to termination of the common carrier movement, but that alone would be insufficient to clearly show its intention as might have been done in the billing."

We submit that this intention partly expressed in these letters taken in connection with the designation of the "N. P. T." in the routing, the refusal of the Terminal Company to pay to S. P. & S. more than its division on the Richfield shipments, besides the continued knowledge, shown by the evidence throughout the record, that the actual destination was in fact the oil spur, and the fact that it was the duty of the carrier

issuing the bills of lading to issue one free of ambiguity when it had the knowledge requisite to make the billing free of ambiguity should be sufficiently clear and this evidence certainly overcomes any doubt of intention by the simple use of the words "Guilds Lake" in the bills of lading, and certainly should not warrant this court in finding as it has from these words alone that it was the intention that the shipments stopped at the interchange track, when the words "Guilds Lake" includes both the interchange track and the oil spur.

The plaintiff, as we have gathered its contention throughout the trial, in its brief, and in the argument, contends, that even if the Terminal Company had written a letter to the plaintiff, before any of the shipments moved, to the effect that the Terminal Company elected not to take delivery at the interchange track but elected to take delivery at the oil spur, that this would not be sufficient, although as we read this court's opinion it would have complied with what the court has said was our duty and that in such event the Terminal Company could have participated irrespective of the language of the bill of lading. We understand plaintiff's position is, that irrespective of any knowledge it may have of where the shipments were destined and irrespective of any notice by the Terminal Company to the S. P. & S., it was entitled to the entire revenue, unless the bill of lading itself designated "oil spur" rather than simply "Guilds Lake" as the destination and this notwithstanding the fact that it was its duty to issue a bill of lading free from ambiguity. In other words, had its own agent issuing the bill of lading been thoroughly

directed by the Terminal Company to bill it to "oil spur," that if such agent had neglected, refused or forgotten to include the words "oil spur" in the bill of lading the S. P. & S. by virture of the failure of its own agent to follow directions could and would refuse to pay the Terminal Company its division of the through rate. Plaintiff's attorneys maintain that in some way it was the obligation of the Terminal Company, although not a party to the bill of lading, and although the S. P. & S. had full knowledge of the intended destination to see that the words "oil spur" were inserted in the bills, and if the Terminal Company did not see that the S. P & S. did insert the words, then irrespective of any knowledge on its part the Terminal Company could not participate in the revenue.

This uncertainty arises only by reason of the fact that the Terminal Company had designated a track at Guilds Lake as the track on which it would receive interchange shipments. The Terminal Company could have changed this interchange track at will. It could have designated as the interchange track where it would receive shipments from the S. P. & S. at the Union Station, in which event the S. P. & S. would have been compelled to bring these cars approximately two miles further south and in which event the plaintiff concedes the designation in the bill of lading as simply "Guilds Lake" would have been sufficient to not only enable but to require the S. P. & S. to account to the Terminal Company for half the switching charges. In fact, at an earlier date the Terminal Company had designated the interchange track at the Union Station yard. It

was more convenient for all concerned to receive all shipments from the S. P. & S. at the Guilds Lake Yard, for there it made up and broke up its trains and if the interchange had been at the Union Station yard the Terminal Company would have had to take the interchanged cars back to Guilds Lake for the purpose of classifying the cars. The consignors, parties to the bills of lading, did not know where the interchange between the two carriers was effected. The S. P. & S. did know and with this knowledge it should be required to sufficiently specify, if it considered it of primary importance, that its agent in issuing the bills of lading make it specific, for it knew where the cars were actually going and it also knew that under its tariff it was required to deliver the shipments at any point within what was designated as "Guilds Lake" and it could not make delivery at any destination within Guilds Lake except by the carrier services of the Terminal Company. It could only go upon a specific track for the purpose of interchanging cars for further transportation. It knew that the Terminal Company could not unload the cars at the interchange track because it had no unloading facilities there and it had been definitely advised of the Terminal Company's refusal to accept that as the destination of the shipments, both by letter and by the refusal to pay on the Richfield Oil shipments, except on the basis of delivery at the oil spur.

The plaintiff, however, was not so squeamish in regard to shipments for other carriers, for it was accepting shipments from the Sunset Oil Company at Linnton, Oregon, consigned to "Northern Pacific Railway

Co., Portland, Oregon", and "they are billed directly to the Northern Pacific Railway Co. at Portland, Oregon, no particular track being designated." (Tr. 81.) Yet these shipments were taken to the oil spur at Guilds Lake and put into the same oil tank as the Terminal Company oil and the Northern Pacific Railway Company paid to the S. P & S. only fifty per cent of the switching charge and made its independent settlement with the Terminal Company for the Terminal Company's part of the shipment. (Tr. 82.) All the S. P. & S. required, as to showing of the destination, was the Terminal Company's statement that this shipment was unloaded at Guilds Lake Yard after the movement occurred. If the S. P. & S. could divide the revenue with the Terminal Company on the shipments to the Northern Pacific Railway Company, and not require a specific track to be designated in the bill of lading, and would accept evidence as to the movement and intention after the movement, then why was it so necessary that as far as the Terminal Company itself was concerned that the particular track be designated in the bill of lading? Why was it not the duty of the S. P. & S. to properly designate, if it deemed the same necessary, the track in the bill of lading when it issued the bills?

Pursuing the foregoing thought as to destination of the interchange track, had the Terminal Company during the course of the years of this traffic changed the designation of the interchange track on which it would receive shipments from the S. P. & S., from the Guilds Lake Yard to the Union Station Yard, or any track outside of Guilds Lake, and the bills of lading remained

as they were, would not then the Terminal Company be entitled to its division of the revenue. Or to reverse the position, if the interchange track at the inception of these shipments had been at the Union Station Yards or some track outside of the Guilds Lake Yard, and later during the course of the shipments, the Terminal Company had changed the designation of the interchange track to the Guilds Lake Yard, would that fact, coincident with the change of the interchange track give the entire revenue to the S. P. & S. or with the change of this interchange track, whose duty would it have been to change the bills of lading? Could the court have concluded, that simply by the change of the location of the interchange track to Guilds Lake, it showed an intention to accept delivery at the interchange track, instead of the oil spur where the shipments had theretofore been moving.

The record is silent as to when the Guilds Lake Yard was designated as the point of interchange. The point of interchange was simply a matter of convenience for the carriers and could be changed by the receiving carrier at any time it saw fit, and we submit that the matter of coincidence that the interchange track happened to be within Guilds Lake, did not in any way effect the intention of the ultimate destination of the shipments but was simply a matter of carrier's convenience in expediting the business between the two lines.

In this connection this court has stated in its opinion in describing the method in which the business was transacted:

"Plaintiff delivered the cars to defendant on

> the interchange track at Guilds Lake, from which track the defendant then transported the cars on the fuel oil spur to its unloading tank, the final destination, there unloaded the cars and returned them to plaintiff at the interchange track."

This would seem to indicate that the cars were taken back to the Terminal Company's interchange track at Guilds Lake whereas, after unloading, they were taken not to the Guilds Lake interchange but to the interchange of the S. P. & S. at the Admiral Dock, some one and one-half miles south of Guilds Lake, for the S. P. & S. had designated the Admiral Dock track as the track on which it would receive interchanges from the Terminal Company. (Tr. 84-85, 88.) The Admiral Dock track was designated by the S. P. & S. for its convenience. In other words, the receiving carrier designated for its convenience the track on which it would receive transfers from the other and the Terminal Company had to turn over the cars when empty at the S. P. & S. transfer track and not at the Terminal Company transfer track.

We submit, therefore, that while this court has adopted the correct principle of law it has erred in the application thereof and in determining that it was the intention of the shipper that the carrier transportation should cease at the interchange track at Guilds Lake.

Respectfully submitted,

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